IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1950

No. [redacted] 6

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY OF THE INLAND WATERWAYS, INC., A CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA AND NAVY DEPARTMENT—WAR CONTRACTS RELIEF BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SAMUEL F. JACOBSON,
GEORGE M. SHKOLER,
HENRY S. BLUM,
110 S. Dearborn Street,
Chicago 3, Illinois,
ROLLO N. CHAFFEE,
First National Bank Bldg.,
Duluth, Minnesota,
Counsel for Petitioner.

GEORGE M. SHKOLER,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

CASES.

STATUTES AND REGULATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY OF THE INLAND WATERWAYS, INC., A CORPORATION,
Respondents.

vs.

UNITED STATES OF AMERICA AND NAVY DEPARTMENT—WAR CONTRACTS RELIEF BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Your petitioner, Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a corporation, respectfully prays that a Writ of Certiorari issue to review a final order of the United States Court of Appeals of the Eighth Circuit which, in affirming an order of the United States District Court for the District of Minnesota, determined that the petitioner had no right to present a claim for relief pursuant to Public Law 657, 60 Stat. 902, 41 U. S. C. A. Par. 106 Note, and popularly known as the Lucas Act.

SUMMARY AND STATEMENT OF MATTERS INVOLVED.

The petitioner, as Trustee in Bankruptcy, prior to VJ-Day, August 14, 1945, had asserted various claims against the Navy Department of the United States on certain contracts and supplements thereto. Prior to the enactment of legislation popularly known as the Lucas Act (Public Law 657, Act of August 7, 1946, 41 U. S. C. A. Par. 106 Note, 60 Stat. 902) the petitioner and respondent, United States of America, entered into an agreement settling the claims of the petitioner and releasing the respondent of all claims as a result of the said contracts and transactions.

This matter involves a claim arising out of said contracts and supplemental contracts sought to be allowed pursuant to the provisions of a statute popularly known as the Lucas Act, Public Law 657, 79th Congress, and is entitled "An Act to Authorize Relief in Certain Cases Where Work, Supplies, or Services Have Been Furnished for the Government Under Contracts During the War."

The District Court for the District of Minnesota, 5th Division, on August 28, 1948, 80 Fed. Supplement 90, by an "Order granting Respondent's Motion for Summary Judgment" (Rec. p. 16) dismissed the instant proceedings. The motion for Summary Judgment was based solely on the pleadings and an exhibit attached to the Motion which is a certified copy of a settlement agreement. No evidence was taken; no witnesses were sworn; the disposition of the rights of the petitioner were decided on the pleadings alone. There is an issue of fact which can only be determined upon a hearing on the merits.

The issues involved in the granting of respondent's Motion to Dismiss are interpretations as to the meaning and purpose of the legislation upon which the petitioner's claim is based and a final decision as to the nature and intendments to the Lucas Act will affect all of the litigation now pending and undetermined in various United States Courts throughout the nation.

The fundamental issue involved in this and in all of the other cases pending in United States Courts is whether the Lucas Act above referred to is merely an extension of the First War Powers Act or whether it is legislation which intended relief to all contractors, subcontractors, and materialmen who suffered losses on the sum total of all of their war contracts with the government, without fault or negligence on their part.

In the event the conclusion would be that the Lucas Act is merely an extension of the First War Powers Act of 1941, then the test of whether or not a claimant could recover any losses may be measured by whether such a recovery would, in the language of the Court of Appeals in these proceedings, promote "the national defense in time of great emergency. Contractors were the incidental beneficiaries of the Act."

If, however, the conclusion is (and the petitioner contends that it is inescapable) that the Lucas Act goes far beyond the purposes of the First War Powers Act of 1941 and intended a fair and equitable settlement of claims for losses incurred without fault or negligence on the part of the contractor, subcontractor, or materialman, then we must measure the claims filed on the equitable principles so clearly and adequately set forth in the Act itself.

The questions presented are set forth herein under that title.

This is the fundamental issue involved, but other issues

must be determined which will affect not only the instant proceeding but practically all of the other pending claims under the Lucas Act.

These issues briefly summarized are:

(1) Whether petitioner's claim under the Lucas Act discloses any written request for relief as required by the Act.

(2) The validity of Paragraph 204 of Executive Order 9786 which were purportedly promulgated pursuant to the provisions of the Lucas Act.

(3) Whether petitioner's claim is barred by the execution of a settlement agreement between the petitioner and the respondent which was entered into prior to the passage of the Lucas Act.

The petitioner filed an appeal from the Order of the District Court, dismissing the proceedings. An appeal was taken to the United States Court of Appeals for the Eighth Circuit which affirmed the order of the District Court in 176 Fed. 2nd 599 (Rec. 36) on August 24, 1949.

STATEMENT AS TO JURISDICTION OF THIS COURT TO GRANT CERTIORARI.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (Judicial Code, Section 1254) and under Section 2 of Article III of the Constitution of the United States. The subject matter involves the interpretation of a Federal Statute—Public Law 657, 41 U. S. C. A., Par. 106, Note, 60 Stat. 902.

THE STATUTE INVOLVED.

The statute involved is Public Law 657 (79th Congress, Chapter 864—2nd Session) 41 U. S. C., Par. 106, Note, 60 Stat. 902, and popularly known as the Lucas Act.

The Act is set forth in full in the Appendix.

DATE OF JUDGMENT OF DECREE SOUGHT TO BE REVIEWED AND REFERENCE TO THE DECISIONS OF THE COURT OF APPEALS AND THE DISTRICT COURT.

The decision sought to be reviewed is that of the United States Court of Appeals for the Eighth Circuit, entered on August 24, 1949, and reported in 176 Fed. 2nd 599 (Rec. P. 36). The decision of the Court of Appeals sustained the order of the District Court of Minnesota, 49 Fed. Supp. 675, entered on August 28, 1948 (Rec. P. 16). This Court, by an order dated the 22nd day of November, 1949, upon application of counsel for the petitioner, extended the time for the filing of the Writ of Certiorari to January 20, 1950.

THE QUESTIONS PRESENTED.

1. Is the Lucas Act (Public Law 657) merely an extension of the First War Powers Act of 1941 or is it legislation designed for the purpose of granting equitable relief entitling contractors, subcontractors, and materialmen to recover losses on war contracts incurred without fault or negligence on their part?

2. Does the petitioner's claim filed pursuant to said Act disclose a written request for relief as required by said legislation?

3. Is petitioner's claim barred by the execution of a settlement agreement between the parties, which was entered into prior to the enactment of the Lucas Act?

4. Are Paragraphs 204 and 307 of Executive Order 9786, purportedly promulgated pursuant to the provisions of the Lucas Act, valid or are they contradictory to the provisions of the Lucas Act so that they cannot be invoked against petitioner?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The Court of Appeals has decided important questions of Federal Law which have been the subject matter of conflicting decisions in the courts, and which have not been, but should be settled by the Supreme Court.

The issues involved in these proceedings have been subject to varying and conflicting interpretations of many Courts, some of which sustain the interpretations of the Lucas Act as contended for by the petitioner and some of which lend an interpretation to the Act contended for by the respondent.

As far as we have been able to ascertain, the cases which sustain the petitioner's position are as follows:

Warner Construction Co. v. *Krug et al.* (80 Fed. Supp. 81 In the District Court of the United States for the District of Columbia).

Stephens Brown, Inc. v. *United States* (81 Fed. Supp. 969 In the District Court of the United States for the Western Division of the Western District of Missouri).

Howard Industries, Inc. v. *United States.* (Court of Claims No. 48874).

Milwaukee Engineering and Ship Building Co. v. *United States* (Court of Claims No. 48888).

Modern Engineering Co. v. *United States* (Court of Claims No. 48876).

Warner Construction Co. v. *United States* (Court of Claims No. 48871).

Centquer Construction Co., Inc. v. *United States* (Court of Claims No. 48869).

The cases holding contrary to these decisions are:

Jardine Mining Co. v. *R. F. C.* (Case No. 2843-47 In the District Court of Columbia).

Acme Fur Dressing Co. v. *United States* (80 Fed. Supp. 927 In the District Court of the United States for the Eastern Dist. of New York).

Fogarty v. *United States* (the instant case) (Case No. 13,857, also cited as *In re: Inland Waterways, Inc.* (49 Fed. Supp. 675 In the District Court of Minnesota) and in the Court of Appeals in 176 Fed. 2nd 599).

F. G. Vogt & Sons v. *United States* (79 Fed. Supp. 929 in United States District Court for the Eastern District of Pennsylvania).

Davidson v. *United States* (82 Fed. Supp. 420 (D. D. C.)).

The decisions above referred to present a direct and serious conflict in the interpretation of the Lucas Act and the provisions of Executive Order 9786 purportedly promulgated pursuant thereto. There are many cases still pending in the lower courts involving this Act so that the questions presented in this Petition for a Writ of Certiorari involve issues of general importance and substance which should be determined by this Court.

The questions involved are:

I.

Does Petitioner's Claim, Filed Pursuant to the Lucas Act, Indicate That a Proper Written Request for Relief Was Filed, Within the Meaning of the Act?

The statute under consideration is popularly known as the Lucas Act, Public Law 657, 79th Congress, and is entitled "An Act to Authorize Relief in Certain Cases

Where Work, Supplies, or Services Have Been Furnished For the Government Under Contracts During the War."

The Act is brief and we have set forth the same in full in the Appendix.

The portions of Executive Order 9786 which are entitled "Regulations Governing the Consideration, Adjustment, and a Settlement of Claims Under Public Law 657, Approved August 7, 1946" and which are pertinent to the issues involved in these proceedings are as follows:

> "204. No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date."
>
> "307. Relief with respect to a particular loss claimed shall not be granted under this Act and these Regulations unless the war agency considering the claim finds, or, in case such loss was incurred under the contracts and subcontracts of another war agency, such other war agency finds, that relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945."

A mere reading of the language of the Act, and that especially set forth in Section 3 thereof, and the portions of Executive Order 9786 above set forth will indicate contradictions between the Act and the portions of the Executive Orders referred to, with respect to what constitutes "a written request for relief."

The District Court and the Court of Appeals for the Eighth Circuit contend that the plaintiff is not entitled to relief under this Act by reason of the fact that the plain-

tiff had not filed a written request for relief from losses *within the meaning of the Act.*'

The opinions of said Courts do not contend that the plaintiff filed no written request for relief whatsoever. The opinion of the District Court merely sets forth that "It is not sufficient that a request for some sort of relief was filed. A request for relief from a loss must definitely be a request for an amendment to a contract without consideration under the First War Powers Act" (Printed Record, page 19). In the prior paragraph of the court's opinion, the District Court expressed this interpretation of the Act:

> "Congress under the Act of August 7, 1946 intended to limit consideration to a request for relief from loss under the First War Powers Act which was undetermined on August 14, 1945" (Printed Record, page 19).

The Court of Appeals is of the same opinion. This is indicated in 176 Fed. 2nd 599, at Page 601 (Record, page 40) wherein the Court of Appeals holds:

> "For, if, as we hold, appellant never on or before August 14, 1945, filed a written request for relief under the First War Powers Act, 50 U. S. C. A. Appendix, Par. 601, *et seq.*, it follows that there was never 'a previous settlement' (sec. 3 of the Act of August 7, 1946) of such a claim; and the validity of that part of paragraph 204 of Executive Order 9786 providing that no claim under the Act shall be considered if final action with respect thereto had been taken on or before August 14, 1945, is not involved in the present case."

The above statement of the law is violently opposed to the interpretation of the Lucas Act contended for by this petitioner and the opinions of other Courts, which opinions we shall call to the Court's attention. The Circuit Court

in this case insists that the Lucas Act is a mere extension of the First War Powers Act, 1941; other Courts and the petitioner contend that the Lucas Act is a remedial bit of legislation wholly independent of the First War Powers Act, 1941 and is intended to go far beyond the relief granted by the First War Powers Act, 1941.

The material variance between the Act and the regulations referred to is condemned by the Courts in the following cases:

Stephens-Brown, Inc. v. *United States*, 81 Fed. Supp. 969.

Warner Construction Co. v. *Krug, et al.*, 80 Fed. Supp. 81.

Howard Industries, Inc. v. *United States*, Court of Claims No. 48874

and other opinions of the United States Court of Claims previously referred to.

The decision of the Court of Appeals, however, to the effect that Congress intended to limit consideration to a request for relief from laws under the First War Powers Act has no basis in fact and nowhere in the Act is there any language by which such a conclusion can be gleaned. An examination of the claim that was filed with the District Court on April 2, 1948 (Printed Record, pages 32 and 33), setting forth the counterclaim of the Trustee to the claim of the Government in the bankruptcy proceedings and the numerous billings and other exhibits attached to said claim clearly indicates that *numerous* requests for relief were filed prior to August 14, 1945. The amount which may be due to the claimant is, of course, restricted to the amount which might have been allowed by the depart-

ment or agency concerned and can only be determined after a hearing of this cause on its merits.

The Court of Claims in *Howard Industries, Inc.* v. *U. S.*, Court of Claims No. 48874 at page 10 of its decision, sets forth its conclusions in this connection as follows:

> "The requirement contained in Section 3 of the Lucas Act that claimants must have filed a written request for relief prior to August 14, 1945, merely means, we think, that claimants must be able to show that they had made timely (that is, prior to August 14, 1945) protest to the contracting agencies concerning the losses now sued on and so have given those agencies an opportunity to either grant or deny their claims. This the plaintiff has done by three letters referred to earlier in this decision."

II.

Are Paragraphs 204 and 307 of Executive Order 9786, Promulgated Pursuant to the Lucas Act, Invalid as Being in Conflict With and Contradictory to the Act?

Section 204 of Executive Order 9786 reads as follows:

> "No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date." (Underscoring ours.)

Section 2(a) of the Act provides in part that the board in arriving at a fair and equitable settlement of claims under this Act:

> "* * * shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotia-

tion Act (50 U. S. C. Supp. IV, App. Sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, Sec. 101-125), or similar legislation; (2) relief granted under Section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act." (Underscoring ours.)

This section of the Act is followed by Section 3 which provides in part, "* * * but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act." (Underscoring ours.)

The language of the Act in the two sections above quoted is clear and explicit. There is no ambiguity contained in the language thereof.

After reading Section 2(a) and 3 of the Act, we come to the consideration of the force and effect, if any, of Section 204 of Executive Order 9786. The language therein contained "and no claim shall be considered if final action with respect thereto was taken on or before that date." (August 14, 1945), is clearly and diametrically opposed to the plain and explicit language of the Act above referred to.

The Act, by its plain language, does not and was not intended to limit the scope of the Act to an extension of the First War Powers Act, 1941. The statute under consideration by the Court does not state that it is an extension of the First War Powers Act, 1941. And when the language of Section 3 of the Act is read, providing that a previous settlement shall not operate to preclude further relief, the inconsistency of Executive Order 204 becomes all the more apparent.

The District Court and the Court of Appeals have sought to apply rules of construction to a clear and unambiguous Act which is not subject to the type of statutory interpreta-

tion that we find in statutes which are not so clear and explicit. The Courts consider those latter statutes ambiguous and, therefore, look to sources other than the language therein contained in order to ascertain the meaning thereof.

We can find no clearer or simpler statement of the Law than is found in 50 American Jurisprudence at page 204, reading from Paragraph 225:

> "A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning, that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

The above statement of the law is supported by numerous decisions, both state and federal. Typical decisions are: *Browder* v. *U. S.*, 312 U. S. 335; *Walker* v. *U. S.*, 83 Fed. 2nd 103; *Osaka Shosen Kaisha Lines* v. *U. S.*, 300 U. S. 98, 81 L. Ed. 532, 57 S. Ct. 356; 59 Corpus Juris 952.

Certainly under the statute before the Court the President would have the right to promulgate regulations which would provide for the manner, form and time for the filing of claims and other administrative rules and regulations with reference to the presentation of the claims. Nowhere in this Act is there any authorization giving the President or the Board legislative powers. The President cannot narrow the scope of a statute when Congress plainly has intended otherwise. *Neuberger* v. *Commissioner*, 311 U. S. 83; 85 L. Ed. 58.

The District Court and the Circuit Court of Appeals for the Eighth Circuit have held that the Act limits recovery to First War Powers Act standards. The only reference to the First War Powers Act that stands by itself is a statement in the first paragraph of the Act that the work, etc. should have been furnished to a department or agency *which had been authorized to enter into contracts* and under Section 201 of the First War Powers Act. No issue is raised in this case that the contract of the petitioner with the Government is not within that class. The contract of the petitioner with the Government upon which claim was filed before the Board and which is here pending before the Court meets the requirements of that section of the Act. The regulations, however, are not content with carrying out the express provisions of the Act in accordance with the language therein contained, but they seek to construe a statute where the statute itself, by reason of its unambiguity, is not subject to construction. The District Court as does the Circuit Court of Appeals seems insistent that the Act before the Court is nothing more than an extension of the First War Powers Act and in justification of their position and interpretation insist that their conclusion is the only one tenable because they read the Act "in the light of its legislative background".

The language of all the courts is strong with regard to the rules regarding construction of statutes, and in each case it is the clear and unmistakable rule of law that the language of the Act itself must be followed by the courts where the statute is clear, uncontradictory and contains no ambiguities. The courts below do not contend and have made no contention that the statute before the Court for consideration is not clear, certain, or unambiguous.

Our contention is adequately supported by the finding of Judge Holtzoff in the case of *Warner Construction Co.* v. *Krug, et al.*, District Court of the United States for the District of Columbia, 80 Fed. Supp. 81, and also by Judge Albert L. Reeves in the case of *Stephens-Brown, Inc.* v. *United States*, 81 Fed. Supp. 969, in which case the court stated:

> "The contention of the defendant that the claim of May 8, 1944 was denied, and, therefore, under Executive Order 9786 the plaintiff is debarred the right of recovery is untenable. Apparently the Executive Order was prepared in the light of the bill as originally introduced. Paragraph 204 of said Order specifically denies relief where final action with respect to a claim was taken before August 14, 1945. The Executive Order in that regard contravenes the express provisions of the statute which specifically provides, 'but a previous settlement under the First War Powers Act, 1941 or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.' " (Underscoring ours.)

Judge Holtzoff, in *Warner* v. *Krug*, above cited, held:

> "It is claimed by Government counsel it was the intention of the Congress in passing the Act of August 7, 1946, to do nothing more than continue the authority of Government agencies to settlement contracts under the First War Powers Act.
>
> "In support of this contention, Government counsel

refers to various statements made by members of Congress on various occasions. Such statements, however, cannot contradict the unambiguous provision of the statute.

"It is important in this connection to note that when the bill was originally introduced it was much more narrow in its scope than the form in which it finally passed, and it may well be that some of the statements to which counsel refers had reference to the legislation in its original form. The Bill as originally introduced contained a proviso that it should not be applicable to cases submitted under the First War Powers Act, which had been finally disposed of prior to August 14, 1945, and it is significant to observe that this proviso was stricken from the measure in the course of its passage and instead the provision which now apears as the last clause of Section 3 was inserted, affirmatively providing that a previous settlement under the earlier statute shall not operate to preclude further relief otherwise allowable under the Act.

"This legislative history throws a very significant light on the intent of Congress and accentuates the unambiguous meaning of the last clause of Section 3. It is obvious that it was the intention of Congress that a prior scttlement under the earlier statute should not operate to preclude the granting of further relief under the 1946 Act.

"With the policy or expediency of this legislation, the Court has no concern. It is the duty of the Court to enforce the statute as it is written, especially in view of the fact that it is unambiguous.

"In so far as Sections 204 or 307 of the rules and regulations promulgated under the statute may be inconsistent with Section 3 of the Act, these regulations must be deemed invalid, because it is elementary law that executive regulations promulgated for the purpose of carrying the statute into effect must be within the framework of the statute and may not be inconsistent with the statute.

"On the basis of these contradictions, the motion of the defendant for summary judgment will be denied."

The opinions above clearly represent the position of the petitioner in these proceedings.

Paragraph 204 of the Executive Order in question, obviously was written to cover provisions of the original bill which were clearly and specifically rejected by Congress and never passed.

The Executive Department attempts to make effective a provision which Congress expressly repudiated.

The United States Court of Appeals (D. C. Cir.) in *Border Pipe Line Co.* v. *Federal Power Commission*, 171 Fed. 2nd 149, 152 (Nov. 22, 1948) holds: "We cannot write into an Act of Congress a provision which Congress affirmatively omitted."

The limitations set forth in the provisions of Executive Order 9786 apparently were drafted on the basis of the Act as *originally* introduced and are clearly not regulations covering the Act in its final form. Those regulations under the guise of being promulgated for the purpose of administering the Act limits restrictions and nullifies the clear, unmistakable, unambiguous language, spirit and purpose which is set forth in the legislation by virtue of which the petitioner has sought this remedy.

III.

Does the Settlement Agreement of February 20, 1945, Bar the Right of the Petitioner to Maintain His Action?

The consideration by the District Court of the effect of the settlement agreement is again based not upon any language of the Act.

The District Court again has failed to read the unambiguous language of the statute and it is the Court's observation, (Printed Record, page 28):

"The legislative history is barren of any suggestion

that a binding and valid compromise, resulting from negotiations of the interested parties supported by a consideration on both sides followed by an exchange of releases may be disregarded by claimants to the gratuity extended to the Act of August 7, 1946."

Judge Holtzoff in *Warner Construction Co.* v. *Krug*, 80 Fed. Supp. 81, effectively deals with this contention as follows:

"The Government contends that this action does not apply because the plaintiff's claim had been adjusted and settled under the First War Powers Act. This adjustment and settlement being embodied in an amendatory contract between the plaintiff and the Government. This amendatory contract contains a general relief, running from the plaintiff to the government.

"Ordinarily, such a settlement, and particularly such a general release, would necessarily preclude the assertion of claims for any additional payments under the contract to which the settlement related.

"Section 3 of the Act of August 7, 1946, however, contains the following provision:

> 'A previous settlement under the First War Powers Act of 1941, or under the Contract Settlement Act of 1944, shall not operate to preclude further relief otherwise allowable under this Act.'

It is contended by the plaintiff that this provision waives the definitive effect of the previous settlement and waives the rights of the government under the general release which it had received.

"Obviously the Congress has the right to waive a release in behalf of the government and it would seem under a liberal construction of this provision that this is just what the Congress did.

"The Government claims, however, that the term 'settlement' should be limited to a unilateral adjustment of a claim made by a government agency, and

does not extend to agreements embodied in a contract, or a settlement embodied in a contract.

"In other words, the Government claims that if the administrative agency had settled the claim, that settlement would not preclude further relief. But because the settlement was embodied in the bilateral contract or agreement, which included a release, that such a settlement is not waived by the Act of Congress.

"The Court is unable to find a tenable basis for the Government's contention. The statute is clear and unambiguous. It provides that a previous settlement under the prior Act shall not operate to preclude further relief otherwise allowable under the Act.

"A settlement consummated by bilateral agreement is just as much a settlement as a unilateral adjustment or allowance of a claim. The term 'settlement' covers both methods of adjusting a claim.

"It is obvious to the Court that it was the intention of the Congress, by the Act of August 7, 1946, to authorize Government agencies to make adjustments of claims in addition to any adjustment which had been previously made. Further, a court review was provided for in the 1946 Act, which had not been provided for in the original First War Powers Act."

The statute does not provide, nor are there any combinations of words or phrases that can give rise to any such conclusions, that the previous settlement referred to in the Act must have had new circumstances arising subsequent to the settlement to afford further relief.

The reading into the Act of something that is not there is apparent in the *United Concrete Form Products Company, Inc.* decision of the Navy Department Board, Commerce Clearing House, 4 C. C. F. Par. 60,449, referred to in the District Court's memorandum (Printed Record, page 24) in which the argument is made, that in order for a claim to be otherwise allowable, the right to further relief under the First War Powers Act as to certain por-

tions of the claim would have to be specifically reserved for further consideration by the terms of the settlement itself, or a new request for relief, upon which final action was not taken before August 14, 1945 would have to be submitted.

There is not one word in the Act to support such a conclusion. The contention that for a claim to be otherwise allowable after a settlement has been made, the right to further relief would have to be specifically reserved for further consideration by the terms of the settlement itself, is a construction of language opposed to the plain language in the Act itself.

The legislature has seen fit to allow contractors and subcontractors to obtain reimbursement for the net losses on their Government contracts. That such relief is to be granted in this case is apparent *by the clear statement that a previous settlement shall not operate to preclude relief otherwise allowable under the Act.* It is not for the President or any other administrative agency to enact new legislation by promulgating rules which emasculate the purposes of the Act.

Section 204 of the Executive Orders "* * * and no claims shall be considered if final action with respect thereto was taken on or before that date" (August 14, 1945) is diametrically opposed to the language of Section 3 of the Act which provides that a previous settlement shall not operate to preclude further relief *otherwise allowable under the Act.*

The words of the legislature must be taken in their plain and literal meaning. The plain and obvious language thereof should not be tortured so that the clear and stated word becomes nullified by construction that involves absurdity or contradiction. The statute, being clear and unambiguous, is not subject to construction.

The United States Court of Claims in *Howard Industries, Inc.* v. *The United States*, No. 48874, decided April 4, 1949, holds at the bottom of page 8 of its opinion:

> "Paragraph 204 of the Executive Order is merely a paraphrasing of the provision so omitted and is in direct conflict with the wording of the Lucas Act as enacted and with the intent revealed in its legislative history. Our conclusion is contrary to the decision of the District Court in the case of *Fogarty* v. *United States*, 80 Fed. Supp. 90, which case we have examined with care, but with which we find ourselves unable to agree." (Underscoring ours.)

Conclusion.

In setting forth Petitioner's reasons for the granting of a Writ of Certiorari, we have attempted to limit the discussion to indicate the fact that there are important questions of federal law regarding which many courts of the United States are in violent disagreement and which are still pending before courts throughout the nation.

These important questions have not been, but should be, settled by the Supreme Court. The Petitioner is not appending a supporting brief or argument on any of the other propositions of law or fact involved in the interest of brevity and for the reason that such a brief may deal with the merits which is a discussion not contemplated by the Rules of this Court in a Petition for a Writ of Certiorari.

The Petitioner believes that this Petition sets forth important questions of federal law which, in the public interest, requires the granting of a Writ of Certiorari as herein prayed.

In the event this prayer is granted, the Petitioner desires to submit a brief fully discussing the issues raised in this Petition.

Respectfully submitted,

EDWARD L. FOGARTY,
As Trustee in Bankruptcy of the Inland Waterways, Inc., a corporation,

By SAMUEL F. JACOBSON,
GEORGE M. SHKOLER,
HENRY S. BLUM,
110 S. Dearborn Street,
Chicago 3, Illinois,

ROLLO N. CHAFFEE,
First National Bank Bldg.,
Duluth, Minnesota,
Counsel for Petitioner.

GEORGE M. SHKOLER,
Of Counsel.

APPENDIX.

Statutes and Executive Orders Involved.

(Public Law 657—79th Congress.)
(Chapter 864—2d Session.)
(S. 1477.)

41 U. S. C. 106 Note, 60 Stat. 902.
Act of August 7, 1946.

An Act

To authorize relief in certain cases where work, supplies, or services have been furnished for the Government under contracts during the war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where work, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 (50 U. S. C., Supp. IV, app., sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without

fault or negligence on their part in the performance of such contracts or subcontracts. Settlement of such claims shall be made or approved in each case by the head of the department or agency concerned or by a central authority designated by such head.

Sec. 2. (a) In arriving at a fair and equitable settlement of claims under this Act, the respective departments and agencies shall not allow any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant under which work, supplies, or services were furnished for the Government between September 16, 1940 and August 14, 1945, and shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation Act (50 U. S. C., Supp. IV, app., sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, sec. 101-125), or similar legislation; (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act. Wherever a department or agency considering a claim under this Act finds that losses under any such contract or subcontract affected the computation of the amount of excessive profits determined in a renegotiation agreement or order, and to the extent that the department or agency finds such amount was thereby reduced, claims for such losses shall not be allowed under this Act.

(b) Every claimant under this Act shall furnish to the department or agency concerned any evidence within the possession of such claimant bearing upon the matters referred to in subsection (a) of this section.

Sec. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six

months after the date of approval of this Act, and shall be limited to cases with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945, but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.

Sec. 4. Appropriations or funds available for work, supplies, or services of the character involved in the respective claims at the time of settlement thereof shall be available for payment of the settlements: Provided, That where no such appropriations are available, appropriations for payment of such settlements are hereby authorized.

Sec. 5. Each department and agency shall report to the Congress quarterly the name of each claimant to whom relief has been granted under this Act, together with the amount of such relief and brief statement of the facts and the administrative decision.

Sec. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim, and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision of the court as in other equity cases.

Approved August 7, 1946.

Section 37 of P. L. 773, 80th Cong., 2d Sess., approved June 25, 1948, revising 28 U. S. C., amended Sec. 6 as follows:

"Sec. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims, or, if the claim does not exceed $10,000 in amount or suit has heretofore been brought or is brought within 30 days after the enactment of this amendatory act, with any Federal district court of competent jurisdiction, asking a determination of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision if it was rendered by a district court or petition the Supreme Court for a writ of certiorari if it was rendered by the Court of Claims, as in other cases. Any case heretofore brought in a district court may, at the election of the petitioner to be exercised within thirty days after the enactment of this amendatory act, be transferred to the Court of Claims for original disposition in that court."